No. 17-1106

In the Supreme Court of the United States

MICHAEL SEXTON, WARDEN,

Petitioner,

v.

NICHOLAS BEAUDREAUX,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In disagreeing with the state court's application of *Strickland v. Washington*, 466 U.S. 668 (1984), to Beaudreaux's claim of ineffective assistance of counsel, the decision below purports to apply the deferential standard of review mandated by AEDPA, 28 U.S.C. § 2254(d). Contrary, however, to this Court's detailed explanation of that standard in *Harrington v. Richter*, 562 U.S. 86, 102 (2011), the decision fails to address, let alone refute, obvious arguments that fair-minded jurists could accept as reasonably supporting the state court's rejection of the *Strickland* claim. Instead of deferential review, the court of appeals conducted *de novo* review; and because it concluded that Beaudreaux's claim had merit, it held that the state court was unreasonable in rejecting the claim. That is the same error condemned by *Richter*.

None of Beaudreaux's arguments overcomes the court of appeals' fundamental error. They only highlight how far the decision below strays from AEDPA bounds.

1. Beaudreaux first argues that review is unwarranted because the court of appeals' decision is fact-bound, with few ramifications for other cases. Opp. 19. But it is the court of appeals' disregard of AEDPA that warrants review—as such errors have merited this Court's intervention in many prior cases. *See, e.g.*, *Hurles v. Ryan*, 706 F.3d 1021, 1050 & n.5 (9th Cir. 2013) (Ikuta, J., dissenting) (collecting cases). In *Richter*, this Court expressly condemned an approach identical to that taken by the court of appeals here. Just as in *Richter*, the decision below "all but ignore[s] 'the only question that matters under § 2254(d)(1).'" 562 U.S. at 102.

2. Beaudreaux asserts that the court of appeals "correctly stated and applied AEDPA deferential review." Opp. 19-20. But the court's opinion shows no *Richter* analysis. Only after completing its independent review of the *Strickland* claim, Pet. App. 1a-6a, does the panel majority even acknowledge its obligation to review the state court's rejection of the claim with double deference. *Id.* at 6a-7a (citing *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011)). Then, in deeming the state court decision unreasonable, it relies only on the reasons given for its own *de novo* judgment that Beaudreaux's ineffective-assistance claim has merit. It never mentions or discusses the essential *Richter* and AEDPA consideration of whether there nonetheless are reasonable arguments supporting the state court decision on which a fair-minded jurist could deem counsel's performance competent, the identification procedures not unduly suggestive, and Esho's testimony reliable.

As in *Richter*, "[t]he Court of Appeals appears to have treated the unreasonableness question as a test of its confidence in the result it would reach under *de novo* review." 562 U.S. at 102. That approach—relying on a *de novo Strickland* analysis and then giving lip service to AEDPA deference as an afterthought—once again has resulted in sidestepping § 2254(d). *See id.* at 104.

3. a. Relying primarily on *Foster v. California*, 394 U.S. 440 (1969), Beaudreaux contends that the court of appeals correctly applied § 2254(d) to conclude that trial counsel could not reasonably have determined that a suppression motion would be unsuccessful. Opp. 23-31. But reasonable state court jurists could easily have concluded that *Foster* is dis-

tinguishable from this case and does not compel the suppression of Esho's identification of Beaudreaux.

In *Foster*, the police called the sole eyewitness to a robbery, Joseph David, to the stationhouse to view a live lineup. 394 U.S. at 441. There were three men in the lineup: Foster, a tall man who was almost six feet in height, and two other men who were short—5'5" or 5'6." *Id.* In addition, Foster wore a leather jacket in the lineup that was similar to the one David said he had observed underneath the coveralls worn by the robber. *Id.* This Court stated:

> After seeing this lineup, David could not positively identify petitioner as the robber. He "thought" he was the man, but he was not sure. David then asked to speak to petitioner and petitioner was brought into an office and sat across from David at a table. Except for prosecuting officials there was no one else in the room. Even after this one-to-one confrontation David still was uncertain whether petitioner was one of the robbers: "truthfully—I was not sure," he testified at trial. A week or 10 days later, the police arranged for David to view a second lineup. There were five men in that lineup. Petitioner was the only person in the second lineup who had appeared in the first lineup. This time David was "convinced" petitioner was the man.

Id. at 441-442.

This Court held that this series of police-arranged physical encounters between the eyewitness and the suspect constituted "a compelling example of unfair lineup procedures." *Foster*, 394 U.S. at 442-443. The unduly suggestive elements in each lineup "made it all but inevitable that David would identify petitioner," which "so undermined the relia-

bility of the eyewitness identification as to violate due process." *Id.* at 443.

The lineups in *Foster* involved multiple unduly suggestive elements: a pronounced height difference that made the defendant stand out; the defendant wearing clothes distinctive to that of the robber; and a final lineup occurring only after what appears to have been an extended one-on-one confrontation with the witness. Here, in contrast, Beaudreaux's main complaint was that photos of Beaudreaux's face—and different photos at that—appeared in two lineup displays. Fair-minded jurists could conclude that *Foster* does not require suppression in this case.

Moreover, *Foster* did not discuss photo lineups at all. It thus did not address "'the specific question presented by this case.'" *Woods v. Donald*, 135 S. Ct. 1372, 1377 (2015) (per curiam); *see id.* ("if the circumstances of a case are only 'similar to' our precedents, then the state court's decision is not 'contrary to' the holdings in those cases"). [1] Indeed, Beaudreaux acknowledges that habeas relief in this case might require what he calls a "reasonable extension" of this Court's precedents. Opp. 25. But the

[1] This Court has addressed photo identifications in two cases: *Manson v. Brathwaite*, 432 U.S. 98 (1977), where the witness was shown a single photo of the suspect, and *Simmons v. United States*, 390 U.S. 377 (1968), where witnesses were shown snapshots of the two suspects primarily in group photos obtained from a family member. Neither of those cases concerned the kind of six-person photo lineup generated by the police in this case. Moreover, the Court has affirmed that, despite various potential hazards involved with identification by photograph, "this procedure has been used widely and effectively in criminal law enforcement . . . . We are unwilling to prohibit its employment, either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement." *Simmons*, 390 U.S. at 384.

Court has made clear that "if a habeas court must extend a rationale before it can apply to the facts at hand then the rationale cannot be clearly established at the time of the state-court decision. . . . Section 2254(d)(1) would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law." *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004) (per curiam).

b. In Beaudreaux's case, neither of the two February 2008 photo identification procedures conducted with witness Esho was marred by unconstitutionally suggestive police practices. Esho was shown two different photo lineups, with each including a significantly different photo of Beaudreaux. *See* Pet. App. 103a-104a. The necessity for the second photo lineup was justified by the police discovery of an earlier photo of Beaudreaux that was taken closer in time to the shooting. *See Simmons*, 390 U.S. at 384-385. The record contains no suggestion that the police told Esho that either photo array contained someone they had arrested, or that the police otherwise employed methods designed to convey that Beaudreaux was "the man" (*see Foster*, 394 U.S. at 442). Nor did the composition of either photo lineup intrinsically draw attention to Beaudreaux's picture. *See* Pet. App. 103a-104a. Under such circumstances, this Court has repeatedly held that a defendant's rights are sufficiently safeguarded through trial processes, including cross-examination, jury instructions, and the requirement that guilt be proved beyond a reasonable doubt. *Perry v. New Hampshire*, 565 U.S. 228, 233 (2012); *Simmons*, 390 U.S. at 384.

Beaudreaux argues that impermissible suggestiveness of the photo lineups is demonstrated by Esho's trial testimony that "it was obvious Beaudreaux was the suspect because he recognized

Beaudreaux from the first array, and he might have 'relied' on the first array, to pick Beaudreaux in the second." Opp. 29 (citing RT 748).[2] Esho, however, did not testify that he surmised Beaudreaux must be the suspect because Beaudreaux was in both lineups. Esho was asked at trial if seeing Beaudreaux in the second lineup made it "easy to pick him out." He testified, to the contrary, that it was the "same both times" and "I said the photo was pretty close." RT 748. Esho speculated that "maybe" he relied on the first photo lineup in picking Beaudreaux out in the second lineup later the same day, but said that it "might just be a thing that happens subconsciously. I don't know." *Id.* Asked twice if he testified that he recognized the second photo as being the "same guy" he had just identified in the prior lineup, Esho said he did not think he testified to that "exactly"; rather, he had said the person in the second photo "was very close" or "really close." *Id.* Far from Esho confirming

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[2] The relevant exchange between defense counsel and Esho is as follows: "Q. Now, the second time you looked at a photograph of Mr. Beaudreaux, that was the same day you looked at the photograph of him earlier, isn't that correct? [¶] A. That's correct. [¶] Q. So on the second lineup, it was pretty easy to pick him out, because you had already seen the same guy earlier that day, right? [¶] A. I would say it was the same both times. I said it was pretty close. [¶] Q. Well, didn't you rely on the first lineup as an assistance in picking out Mr. Beaudreaux in the second lineup? [¶] A. Maybe. Not like on purpose. [¶] Q. What do you mean 'not on purpose'? [¶] A. It might just be a thing that happens subconsciously. I don't know. [¶] Q. Now, did you testify at the preliminary hearing that in the second lineup you recognized the photograph as being the same guy you had identified before? [¶] A. I just said he was very close. [¶] Q. Did you say that you recognized him in the second lineup, this photograph, as being the same guy you had just identified in the prior lineup? [¶] A. I think I said really close. I don't know if I said that exactly." RT 748.

that he identified Beaudreaux from repeated viewings of his photos, the reasonable inference from his testimony was that the two photos of Beaudreaux were each "pretty close" to the shooter, with the one closer in time to the shooting being "really close." Further, Esho became sure the gunman was Beaudreaux only upon seeing Beaudreaux in person at the preliminary hearing, where it "[j]ust basically clicked." Pet. App. 64a. At the preliminary hearing, Esho recognized both Beaudreaux's appearance and "[s]ort of the way that he walked." *Id.*

That testimony would not compel a reasonable state court jurist to conclude that the police used impermissibly suggestive identification procedures to procure Esho's identification of Beaudreaux. It instead supports the opposite conclusion. The entirety of that testimony reflects that Esho over time became more certain of his identification of Beaudreaux as the gunman after he saw a recent photo, then a photo taken nearer in time to the shooting, then Beaudreaux in person. Therefore, the state court could have readily concluded that reasonable counsel would not have felt compelled to bring a motion challenging the identifications under these facts, or that such a motion in any event would not have been meritorious. *See Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986); *Richter*, 562 U.S. at 105 (habeas review of *Strickland* claim is "doubly" deferential).

c. Beaudreaux also endorses (Opp. 30-31) the court of appeal's contention that "[c]ourtroom procedures such as the defendant's preliminary hearing are 'undoubtedly suggestive' as to the defendant's identity as the perpetrator." Pet. App. 4a, citing *Johnson v. Sublett*, 63 F.3d 926, 929 (9th Cir. 1995),

and *Foster v. California*, 394 U.S. at 443.[3] However, this Court has never held that a court proceeding itself may demonstrate unconstitutional suggestiveness. *Foster* concluded that the police-initiated lineups and one-on-one confrontation in that case amounted to a "compelling example of unfair lineup procedures," 394 U.S. at 442, but it did not include the witness's subsequent identification of Foster *in the courtroom* in that criticism.

To the contrary, in *Perry v. New Hampshire* the Court held that the due process check on the admission of eyewitness identification is applicable only when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime, "for example, at a lineup, showup, or photograph array." 565 U.S. at 232-233. In rejecting the notion that courts may exclude non-police-arranged identifications, the Court acknowledged, "Most eyewitness identifications involve some element of suggestion. Indeed, all in-court identifications do." *Id.* at 244. Nevertheless, it held that the due process test of reliability "comes into play only after the defendant establishes improper police conduct." *Id.* at 241. "When no improper law enforcement activity is involved, we hold, it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt." *Id.*

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[3] As noted in the petition (at 14), *Johnson*, as a circuit court decision, does not qualify as "clearly established Federal law" under 28 U.S.C. § 2254(d)(1).

at 233. Thus, the preliminary hearing itself in this case cannot be considered a "third strike" establishing unconstitutional suggestiveness. More to the point, the federal habeas court was required to consider whether arguments that could have supported the state court's conclusion were inconsistent with a prior holding by this Court. *Richter*, 562 U.S. at 102. On the heels of *Perry*, a state court decision that a motion to suppress would not have succeeded because the only police-arranged identification procedures, the two photo lineups, were not unduly suggestive could not be deemed an unreasonable application of this Court's precedent.

4. Finally, Beaudreaux argues that a summary disposition would be inappropriate. Opp. 40. He suggests that prior cases in which this Court has summarily reversed are "materially distinguishable" from the present case. *Id.*

In this case, the court of appeals has repeated the error that this Court summarily corrected in *Richter*. That the Court has also summarily reversed decisions that failed to apply AEDPA in somewhat different ways does not make summary disposition any less appropriate. Once again, the decision below clearly "collapses the distinction between an 'unreasonable application of federal law' and what the majority believes to be an incorrect or erroneous application of federal law." *Nevada v. Jackson*, 569 U.S. 505, 512 (2013) (per curiam). Summary reversal is appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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